88-1093

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

No. _____

BILLY JOE HILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State initiated pretext search, not based on probable cause, of individuals and their automobile at a U. S. Border Patrol Checkpoint violates the protections of the Fourth Amendment to the United States Constitution.

2. Whether simple possession of a minute quantity of cocaine by Petitioner meets due process requirements of proof beyond a reasonable doubt of conspiracy and possession of cocaine found concealed in another area of the automobile in which Petitioner was a passenger.

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The Petitioner, Billy Joe Hill, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not to be reported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 29, 1988. A Petition for Rehearing En Banc was filed on behalf of Petitioner and was denied on October 28, 1988 without written opinion. The jurisdiction of this court is invoiced pursuant to 28 U.S.C.A. sec. 1254(1) (1966).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. Amend. V:

> . . . Nor shall any person . . . Be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On March 6, 1987, Border Patrol Agent Bonilyn Carroll was working at the ZY-11 Border Patrol Desert Haven Checkpoint located on Highway 62-180 approximately 30 miles east of El Paso, Texas. (R. III 6,8). At approximately 1:30 p.m. on March 6, 1987, Agent Carroll received information from Deputy Sheriff Bub Lewis regarding an automobile which he wanted stopped (R. III 432). Later,

at approximately 3:30 p.m. while working alone, Agent Carroll saw an automobile matching the description given by Deputy Lewis and stopped the automobile. (R. III 9). After asking some preliminary questions of the three occupants, Agent Carroll requested the automobile move to "secondary" and radioed for Border Patrol Agent Helen Hermanson and Deputy Lewis to return to her location (R. III 13). Both Agent Hermanson and Deputy Lewis arrived later and the officers then started their search (R. III 18).

A search of the automobile recovered a handgun in the trunk, a quantity of white powdery substance in a bag inside boots in a box in the back seat, a film container with a quantity of white powdery substance in the back floor board, a small amount of white powder in Petitioner's shirt pocket, marijuana in an M&M candy bag in the side pocket of the passenger door, a piece of white rolled paper floating in a Wendy's coke cup, some foil squares in the arm rest and glove box, and a pair of tweezers in the arm rest (R. III 21, 27, 28, 29, 31, 106). The occupants of the vehicle were Petitioner and co-defendants, Roy Dale Traphagan and Henry T. Morgan. (R. III 10-11). Mr. Traphagan and Mr. Morgan constituted all other Defendants named in the indictment returned against the Petitioner. All occupants were arrested at the scene (R. III 28).

The jurisdiction of the United States District Court for the Western District of Texas, the Court of the first instance, was invoked pursuant to 18 U.S.C.A. sec. 3231 (1985).

REASONS FOR ALLOWANCE OF THE WRIT

I.

Petitioner filed a Motion to Suppress the evidence seized as a result of the search conducted on March 6, 1987 (R. I 313, 98). On June 2, 1987, a hearing was held on Petitioner's Motion to Suppress Evidence. The court overruled Petitioner's Motion to Suppress by a written order on June 15, 1987, a copy of which is attached hereto as Exhibit "B" and again on August 17, 1987. (R. I 174, 322, 268). The issues present an important question of law which should be settled by this Court.

At the hearing conducted on Petitioner's Motion to Suppress, Deputy Lewis testified that at approximately 11:00 a.m. on March 6, 1987, he received information from a confidential informant that "there would be, *possibly be* a white Trans Am with a Firebird on the hood, T-top, with blue license plates, yellow numbers, license number would be CSM 713. And it had *two males*. They would be en route to El Paso and returning on 62-180, with *possible* cocaine in the vehicle. . . There would *possibly* be a pick-up truck with New Mexico registration *following* the vehicle." (R. II 41-42, 38, 30, 6) (emphasis added). There was no information received by Deputy Lewis nor conveyed to Agent Carroll that the described automobile would be crossing an international border at any time. (R. II, 6, 14, 32).

Deputy Lewis conveyed this information to Agent Carroll working the ZY-11 checkpoint located on HWY 62-180 east of El Paso at approximately 1:30 p.m. on March 6, 1987. (R. II 38, 6). At approximately 3:00 p.m. on March 6, 1987, a red and white pick-up with Kansas plates came to

the checkpoint being worked by Agent Carroll from the east and reported some aliens about five miles up the road to the east. (R. II 11, 16). Thereafter, at approximately 3:30 p.m., Agent Carroll stopped a vehicle containing the Petitioner. (R. II 5).

Agent Carroll testified as follows:

> Q. (By Mr. Bratton) All right. Now this checkpoint, does it have a sign out in front of it that has some lights indicating to someone to stop when they come up there?
>
> A. (By Ms. Carroll) Yes, sir. (R. II 13).
>
> Q. (By Mr. Bratton) Wait a minute. You said there was a light that you could turn green, you could let cars go by; isn't that correct?
>
> A. (By Ms. Carroll) Right.
>
> Q. And in fact on this day when this car came, that green light was on, wasn't it?
>
> A. Yes, it was.
>
> Q. And you went out and saw the car coming, you ran out and turned it on for them to stop didn't you?
>
> A. Right. (R. II 15).
>
> Q. (By Mr. Bratton) All right. When you saw this automobile that was coming up there, this white Firebird, Trans Am, you were going to stop it and hold it for Sheriff "Bub" Lewis, Deputy Sheriff Bub Lewis; is that right?
>
> A. (By Ms. Carroll) Yes.
>
> Q. Didn't have anything to do with any other information you got from any source, did it?
>
> A. No.
>
> Q. And they, the moment you signaled them to

stop, they stopped and backed up, they were not free to go; isn't that correct?

A. No.

Q. That is not correct or they were not free to go?

A. They were not free to go.

Q. All Right. And it was again, that stop was not because you suspected any aliens in there?

A. No.

Q. All Right. And it was based solely on information by (sic) Lewis had indicated to you; is that right?

A. Yes. (R. II 17).

The automobile containing the Petitioner was stopped solely upon the request of Deputy Sheriff "Bub" Lewis based upon information which he had previously received from a confidential informant. (R. II 6, 7, 8, 28, 29). The automobile was not breaking any law at the time of the stop by Agent Carroll. (R. II 27-28). Further, Agent Carroll admitted that the information provided by Deputy Lewis was not fully corroborated at the time of the stop. (R. II 11, 16, 18, 19). The only information received from Deputy Lewis that was corroborted was the make, model, hood design, and license plate of the automobile stopped containing the Petitioner (R. II 7). Agent Carroll did nothing with the automobile until Deputy Lewis arrived. (R. II 21). At that time, a search was conducted of the automobile looking for narcotics. (R. II 22).

The search of Petitioner and the automobile on March 6, 1987 at the Desert Haven Checkpoint was a subterfuge created by the Border Patrol Agents and Deputy Sheriff Lewis. Agent Carroll admitted in her testimony that she

was not stopping all traffic at the permanent checkpoint on March 6, 1987. Her testimony, set forth above, indicates that she was waiving most traffic through and stopped the Petitioner solely because the information previously given by Deputy Sheriff Lewis, and for no other reason. In *United States v. Smith* 799 F. 2d 704 (11th Cir. 1986), the Court held:

> "Proper inquiry is whether a reasonable Officer would have made the seizure in the absence of the illegitimate motivation. Because the evidence suggests that a reasonable Officer would not have stopped the Appellant without an invalid purpose to obtain evidence of additional criminal activity we reverse . . . Proper inquiry, again, is not whether the Officer could validly make this stop but whether under the same circumstances a reasonable Officer would have made the stop in the absence of the invalid purpose." 799 F. 2d at 708, 709.

See also *Maryland v. Macon* 472 U.S. 463 (1985), *Scott v. United States* 436 U.S. 128 (1978).

In the instant cause, an agreement was made between officers of the State and Federal law enforcement agencies to use the Desert Haven Checkpoint and its ability to conduct a plenary search without probable cause as a basis for searching an automobile for which probable cause to search did not otherwise exist. By applying a good faith reliance on the existing law of the Circuit at the time of the search[1] exception to the search conducted herein, the Court will allow such subterfuges to exist not only at checkpoints such as the Desert Haven Checkpoint, but in other areas of the law of search and seizure. It is imperative that the court draw a line for law enforcement officers so that the use of such subterfuge is

[1] *United States v. Jackson* 825 F.2d 853 (5th Cir. 1987).

prevented in the future.

II.

On March 6, 1987, Border Patrol Agent Carroll was working at the Desert Haven Checkpoint located on HWY 62-180 approximately 30 miles east of El Paso, Texas. (R. III 5-6). At approximately 3:30 p.m. on March 6, 1987, Agent Carroll stopped a white Trans-Am automobile containing three occupants of which Petitioner was the front passenger. (R. III 8-12). After preliminary questioning, Agent Carroll requested the vehicle be moved to the "secondary area" of the checkpoint (R. III 13).

After moving the vehicle to the "secondary area" Agent Carroll then radioed for Border Patrol Agent Hermanson and Deputy Sheriff Lewis (R. III 13). While waiting their arrival, Agent Carroll watched the occupants of the vehicle and noticed they were "just moving around and chatting", and that they were smoking cigarettes (R. III 15). Agent Carroll did not notice any objects being passed to the backseat during this period of time (R. III 17).

Upon the arrival of Agent Hermanson and Deputy Lewis, the automobile was searched. (R. III 18). A hand gun was found in the trunk of the automobile. (R. III 20). The occupants were asked to exit the automobile and the interior was search (R. III 24). Agent Carroll picked up a boot box that was located in the back seat behind the driver (R. III 24). Petitioner had been sitting in the front passenger seat (R. III 25). Agent Carroll opened the boot box which she had removed and saw a pair of boots (R. III 26). As she picked up the right boot, Agent Carroll testified that Petitioner was looking around down on the ground (R. III 26). Agent Carroll then found a Skaggs

Alpha-Beta grocery bag which contained two clear bags of white powdery substance inside the right boot later determined to be cocaine of 88% purity (R. III 27, 88). At that point all occupants of the car were arrested and read their rights (R. III 28).

A search of Petitioner produced a small cellophane bag containing a white powdery substance which was later determined to be cocaine of an undetermined purity (R. III 28-29, 89). No fingerprints were found on any of the Government's Exhibits (R. III 38). Leroy James Berens, an analytical forensic chemist with the Drug Enforcement Administration, testified that the quantity of cocaine found in the shirt pocket of Petitioner could not be determined to have come from the quantity of cocaine found in the boots in the box in the backseat of the automobile (R. III 95).

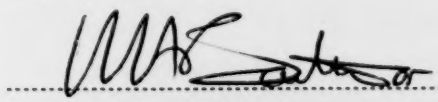
The per curiam panel opinion of the Fifth Circuit Court of Appeals held the evidence sufficient as to Counts I and II based upon a small quantity of cocaine found on the Petitioner alone. The panel opinion cited as authority *United States v. Bergouignan* 764 F.2d 1503 (5th Cir. 1985) and *United States v. Rackley* 742 F. 2d 1266 (5th Cir. 1984). In both *Bergouignan* and *Rackley* substantially more facts existed than the simple discovery of a trace amount of the same drug for which the Petitioner stood charged. In fact, a co-defendant in *Rackley*, Crosby, had facts proven against him more closely analogous those against the Petitioner. Therein, Crosby's shirt contained cocaine residue, but the court held that that proved nothing based upon the circumstances under which it was found.

In the instant cause, the possession by Petitioner of an amount of cocaine so small that its quality cannot be determined is clearly insufficient to establish a link between the cocaine found in a boot in a bag in the backseat of the automobile in which he was a passenger and creates a conflict of authority which must be resolved. There simply must be more to establish the sufficiency of evidence for Petitioner's convictions under the conspiracy and possession counts of the indictment. This insignificant piece of evidence does not establish the elements that Petitioner knew of a conspiracy and knowingly and voluntarily joined it and that he knowingly possessed the cocaine in the boot in the box in the backseat of the car with intent to distribute it.

CONCLUSION

For these reasons, supported by the argument set forth above, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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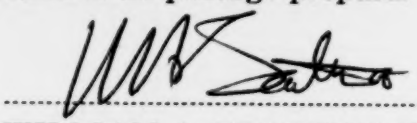
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari for Billy Joe Hill was on this the 27th day of December, 1988, forwarded to the Hon. Leroy Morgan Jahn, Assistant United States Attorney, John H. Wood, Jr., U.S. Courthouse, 655 Durango Boulevard, G-13, San Antonio, Texas 78206 by United States Mail postage prepaid.



WILLIAM A. BRATTON, III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1928

UNITED STATES OF AMERICA,
Plantiff-Appellee,

vs.

BILLY JOE HILL,
ROY DALE TRAPHAGAN,
HENRY T. MORGAN,
Defendants-Appellants.

Appeals from the United States District Court
For the Western District of Texas
(P-87-CR-18 (2 & 3) (1)

(September 29, 1988)

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

PER CURIAM:*

Defendants Billy Joe Hill, Roy Dale Traphagan, and Henry T. Morgan appeal from convictions of cocaine possession and conspiracy to possess cocaine. We reverse Traphagan's convictions, otherwise affirm, and remand.

I. *Facts and Procedural History*

Defendants Billy Joe Hill, Roy Dale Traphagan, and Henry T. Morgan were each charged with one count of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), 846 and one count of

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Traphagan alone was further charged with one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

All three defendants moved for suppression of evidence seized at the Desert Haven checkpoint during a search of the Trans-Am automobile in which defendants were travelling at the time of arrest. The district court denied the motion.

Trial was to the bench. The district court found Traphagan not guilty on the methamphetamine possession count. The district court found all three defendants guilty on the cocaine conspiracy and possession counts. All three defendants appeal, challenging the district court's suppression ruling. Hill and Traphagan additionally challenge the sufficiency of the evidence supporting their convictions.

II. *Discussion*

A.

The district court's suppression ruling rests on two alternative grounds. First, the district court determined that the disputed search did not have to be supported by probable cause because the Desert Haven checkpoint at which the search was conducted qualified as the functional equivalent of the border. Second, the district court determined that there was in any event probable cause to support the search. Defendants challenge the district court's suppression ruling, asserting that there was no probable cause to support the search. We uphold the district court's suppression ruling on the ground that the agents who conducted this search were entitled to rely

upon earlier Fifth Circuit case law holding that no probable cause requirement applied. We therefore need not and do not review the district court's determination that probable cause in fact supported the present search.

In **United States v. Williams,**[1] this Court upheld a district court determination that the Desert Haven checkpoint is the functional equivalent of the border. As the *Williams* Court observed, "searches at the border may be made without probable cause or a warrant."[2] It "'"is not required that the underlying facts concerning a particular checkpoint location be proved over and over again in each case arising out of the same checkpoint location, so long as such facts remain unchanged."'"[3] No evidence was offered the district court to show that the Desert Haven checkpoint had since *Williams* lost its status as a functional equivalent of the border under the law applied by *Williams* to make this determination. The *Williams* determination therefore stands.

In *United States v. Jackson,*[4] the en banc Court recently overturned the "'established law'" of the Circuit that complete searches at checkpoints such as the Desert Haven checkpoint, even though unsupported by probable cause, are "'functional equivalent of border searches and meet the Fourth Amendment requirement of reasonableness.'" Nevertheless, the en banc Court also ruled that

---

[1] 600 F.2d 14, 15 (5th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980).

[2] 600 F.2d at 15.

[3] United States v. Jackson, 825 F.2d 853, 857 (5th Cir. 1987) (en banc) (quoting United States v. Dreyfus-de Campos, 698 F.2d 227, 229 (5th Cir. 1983) (quoting United States v. Salinas, 611 F.2d 128, 130 (5th Cir. 1980)), *cert. denied*, 461 U.S. 937 (1983) *and* 461 U.S. 947 (1983)), *cert. denied*, 108 S. Ct. 711 (1988) *and* 108 S. Ct. 730 (1988).

[4] 825 F.2d 853, 857 (5th Cir. 1987) (en banc) (quoting United States v. Jackson, 807 F.2d 1185, 1190 (5th Cir. 1986)).

"the exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law on the date of the delivery of this opinion." As noted, the instant search is supportable under the prior Fifth Circuit law in *Williams*. Moreover, that search occurred on March 6, 1987, and thus before the August 17, 1987, delivery date of the en banc opinion in *Jackson*. In sum, we uphold the district court's suppression ruling.

B.

Hill and Traphagan also challenge the suffieciency of the evidence supporting their cocaine conspiracy and possession convictions.

On a drug conspiracy charge, the Government "must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it."[5]

On a charge of cocaine possession with intent to distribute, the Government "must prove three elements: (1) knowing (2) possession . . . (3) with intent to distribute."[6]

At the close of the evidence, trial counsel for Hill and Traphagan urged the insufficiency of the evidence. We construe this as a motion for judgment of acquittal and therefore apply our customary standard of review:[7]

---

[5] United States v. Williams-Hendricks, 805 F.2d 496, 502 (5th Cir. 1986); *see also* United States v. Cardenas Alvarado, 806 F.2d 566, 569 (5th Cir. 1986); United States v. Tolliver, 780 F.2d 1177, 1182 (5th Cir. 1986), *vacated on other grounds*, 107 S. Ct. 1267 (1987); United States v. Michelena-Orovio, 719 F.2d 738, 742 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1104 (1984).

[6] *Williams-Hendricks*, 805 F.2d at 500; *see also Cardenas Alvarado*, 806 F.2d at 570; *Tolliver*, 780 F.2d at 1183.

[7] Assuming this rule applies in bench trials as well as jury trials, we note that, in absence of a motion for judgment of acquittal at the close of the evidence, "'the issue of sufficiency of the evidence is

whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt."[8]

Morgan was driving the Trans-Am automobile when it was stopped at the Desert Haven checkpoint. Hill and Traphagan were passengers in the car. The cocaine Hill and Traphagan were convicted of possessing and conspiring to possess was found concealed inside a Tony Lama boot inside a box on the back seat of the searched Trans-Am automobile. The boots appeared to be new. None of the defendants claimed or were otherwise identified with the boots. The critical question is whether the evidence sufficiently linked Hill and Traphagan to the boot cocaine. If this link was established in the present case, a reasonable trier of fact could infer the elements of conspiracy and possession from the circumstances of the case.[9]

We conclude that the evidence did not sufficiently link Traphagan to the cocaine concealed in the boot. Traphagan was a back-seat passenger for an undetermined duration in the Trans-Am with the other defendants when the boot cocaine was found. Nevertheless, "'mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a

Ft. nt. 7 continued
reviewable on appeal only to determine whether there was a manifest miscarriage of justice.'" United States v. Gammage, 790 F.2d 431, 436 (5th Cir. 1986) (quoting United States v. Merritt, 639 F.2d 254, 256 (5th Cir. 1981)).

[8] United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356 (1983); *see also* United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 749 (1988).

[9] *See* United States v. Wajda, 810 F.2d 754, 761-62 (8th Cir.) (citing United States v. Cardenas, 748 F.2d 1015, 1019-29 (5th Cir. 1984)), *cert. denied*, 107 S. Ct. 1981 (1987); United States v. Rackley, 742 F.2d 1266, 1272 (11th Cir. 1984).

finding of possession'"[10] or conspiracy to possess.[11] There was testimony that Traphagan became still when the boot cocaine was discovered, and the Government contends that this showed guilty knowledge.[12] Nevertheless, such an observation of anxiety or nervousness is inconclusive unless corroborated by other evidence.[13] Here, as to Traphagan, there was none.

On the other hand, Hill was also a passenger in the car. He was seated by the driver, Morgan. Hill was said to be exhibiting anxiety after the stop. The case against Hill was stronger, however, because an amount of cocaine was found on Hill's person. Though the amount found on Hill's person was small, it was the same kind of drug that was found in the boot, cocaine. We conclude that a reasonable trier of fact could infer from this evidence that Hill was linked to the boot cocaine.[14] The evidence supporting Hill's conspiracy and possession convictions was therefore sufficient.

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[10] United States v. Ferg, 504 F.2d 914, 917 (5th Cir. 1974) (quoting United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973)); *see also Tolliver*, 780 F.2d at 1184; United States v. Caballero, 712 F.2d 126, 129 (5th Cir. 1983); United States v. MacPherson, 664 F.2d 69, 74 (5th Cir. Unit B 1981); United States v. DeLeon, 641 F.2d 330, 335 (5th Cir. Unit A 1981); United States v. Moore, 546 F.2d 657, 657 (5th Cir. 1977); United States v. Rojas, 537 F.2d 216, 219-20 (5th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977); United States v. Gloria, 494 F.2d 477, 483 (5th Cir.), *cert. denied*, 419 U.S. 955 (1974); United States v. Martin, 483 F.2d 974 (5th Cir. 1973).

[11] United States v. Gardea Carrasco, 830 F.2d 41, 45 (5th Cir. 1987); United States v. Gordon, 700 F.2d 215, 216-17 (5th Cir. 1983); United States v. Willis, 639 F.2d 1335, 1338-39 (5th Cir. Unit A 1981); United States v. Soto, 591 F.2d 1091, 1104 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979) *and* 444 U.S. 845 (1979).

[12] By contrast, there was testimony that Hill was animated and the Government contends that this showed guilty knowledge.

[13] *Williams-Hendricks*, 805 F.2d at 500; *accord id.* at 504 (Hill, J., concurring in part and dissenting in part).

[14] *See Rackley*, 742 F.2d at 1272; *see also* United States v. Bergouignan, 764 F.2d 1503, 1509 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 779 (1988).

The distinction we make to distinguish Hill's case from Traphagan's case, though perhaps unsatisfactory if we were factfinders acting in the first instance, is referable to our standard of review and acceptable when considering the inferences it is permissible for a reasonable trier of fact to draw.

III. *Conclusion*

We are constrained to reverse Traphagan's convictions and remand with instructions to enter a judgment of acquittal for him.[15] We otherwise affirm as to Hill and Morgan.

REVERSED IN PART,
AFFIRMED IN PART,
AND REMANDED

[15] *See* Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150-51 (1978).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1928

UNITED STATES OF AMERICA,
Plantiff-Appellee,

vs.

BILLY JOE HILL,
ROY DALE TRAPHAGAN and
HENRY T. MORGAN,
Defendants-Appellants.

Appeals from the United States District Court

For the Western District of Texas

ON PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING EN BANC

(Opinion September 29, 5 Cir., 1988, _____F.2d_____)

(October 28, 1988)

Before REAVLEY, JOHNSON, and JONES, Circuit Judges.

PER CURIAM:*

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Reahearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM D. JOHNSON

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-87-CR-18 (2)

UNITED STATES OF AMERICA,
Plantiff,

vs.

HENRY THOMAS MORGAN,
BILLY JOE HILL, and
ROY DALE TRAPHAGAN,
Defendants.

MEMORANDUM OPINION AND ORDER

Before this Court is the Motion of Defendants HENRY THOMAS MORGAN, BILLY JOE HILL, and ROY DALE TRAPHAGAN to suppress items of evidence seized during the search of their automobile at the United States Border Patrol Checkpoint on the Carlsbad Highway (NO. 62-180) on the grounds that the border patrol agents lacked probable cause to search the vehicle for contraband.

FACTUAL BACKGROUND

The border patrol operates a permanent immigration checkpoint on the Carlsbad Highway (NO. 62-180) approximately 30 miles west of El Paso.[1] This checkpoint is usually in operation everyday, 24 hours a day. All traffic travelling east or west through the checkpoint is stopped by United States Border Patrol Officers. On March 6, 1987, at about 3:30 p.m., the Defendants HENRY THOMAS MORGAN, BILLY JOE HILL, and

[1] The checkpoint has a permanent building located on the side of the highway and permanently installed lights and signs. This checkpoint is also referred to as United States Border Patrol Checkpoint NO. 1171.

ROY DALE TRAPHAGAN drove up to the checkpoint in a white Pontiac TransAm with Kansas license plates. HENRY THOMAS MORGAN was driving. BILLY JOE HILL was a passenger in the front seat, and ROY DALE TRAPHAGAN was riding in the back seat.

Prior to their arrival at the checkpoint, Border Patrol Agent Bonnie Lynn Caroll had been notified by Hudspeth County Sheriff Bob Lewis to be on the look-out for a vehicle matching the description of the defendant's vehicle. The vehicle, carrying two anglo males, was seen leaving Carlsbad and was going to El Paso. The individuals were believed to be transporting narcotics.

When the defendants arrived at the checkpoint, Agent Caroll asked them their citizenship. They all responded that they were U.S. citizens. At this time, another vehicle drove up to the checkpoint bearing Kansas license plates. The driver of the vehicle stated that he had seen two aliens getting into a car. The border patrol agents were suspicious because the sheriff's report had stated that another vehicle was believed to be travelling with the suspect vehicle. Agent Caroll remained at the checkpoint and the other agent left to check out the alien story.

Agent Caroll directed the defendants to the secondary inspection station in order to detain them. Agent Caroll, then, went to the trailer to check the license plate number of the defendants' vehicle with the description given by Sheriff Lewis. The license plate number matched the description. Agent Caroll radioed Sheriff Lewis.

During this time, the defendants stayed in their vehicle. Agent Caroll returned to the vehicle and asked for the keys. Agent Caroll found a pistol inside the trunk. She

then asked the defendants to get out of the vehicle. The agent then searched the car and found cocaine in a boot inside the car. The agent then read the defendants their rights. Upon further search of the vehicle and the defendants, the agent found an M&M candy bag containing marijuana, and a quantity of cocaine in a camera lense case and in Defendant HILL's pocket. Spindles were also found in an empty "Wendy's" paper cup.

The Defendants move this Court to suppress the items of evidence seized on the grounds that the border patrol agent lacked probable cause to search the defendants' vehicle, and further, that there was no consent to such search.

The Court finds the Defendants' Motion to Suppress to be without merit. Although consent or probable cause are required for searches at permanent checkpoints that are removed from the border, as well as at temporary checkpoints, such as requirement is not imposed a permanent checkpoints which are functional equivalents of the border. *See United States v. Ortiz*, 95 S.Ct. 2585 (975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973); *United States v. Oyarzun*, 760 F.2d 570 (5th Cir. 1985); *United States v. Dreyfus-de-Campos*, 698 F.2d 227 (5th Cir. 1983); *United States v. Luddington*, 589 F.2d 236 (5th Cir.), *cert. denied*, 441 U.S. 936, 99 S.Ct. 2061 (1979). The Fifth Circuit in *United States v. Williams* 600 F.2d 14 (5th Cir. 1979) affirmed the district court's finding that the United States Border Patrol Checkpoint on the Carlsbad Highway (No. 62-180) approximately 30 miles west of El Paso is a functional equivalent of the border.

IT IS, THEREFORE, ORDERED that the Defendants' Motion to Suppress is hereby DENIED.

SIGNED and ENTERED this the 15th day of June, 1987.

/s/ Lucius D. Bunton

LUCIUS D. BUNTON
United States District Judge

THE UNITED STATES DISTRICT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-87-CR-18

UNITED STATES OF AMERICA

VS

HENRY T. MORGAN
BILLY JOE HILL, and
ROY DALE TRAPHAGAN

ORDER

BEFORE THIS COURT is Defendant BILLY JOE HILL's Motion to Check the Validity of Functional Equivalent Status of Checkpoint Number 1171.

This Court has before it the Fifth Circuit decision in *U.S. v. Charles Jackson*, No. 86-1381 (August 17, 1987) that the Sierra Blanca checkpoint should not have been regarded as border equivalent and that plenary searches conducted at the Sierra Blanca checkpoint are unreasonable under the Fourth Amendment. On searches conducted subsequent to August 17, 1987, U.S. Border Patrol agents must proceed on probable cause to search areas too small to conceal a person for contraband. The Fifth Circuit in *U.S. v. Jackson*, however, affirmed the appellant's convictions because the law enforcement agents conducted their search in good faith reliance upon earlier 5th Circuit precedent. *U.S. v. Jackson* following *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, (1984); and *Illinois v. Krull*, 107 S.Ct. 1160 (1987).

This Court, upon review of arguments of counsel, the testimony heard on June 2, 1987, and the pleadings filed in this court is of the opinion that a survey to check the

validity of checkpoint 1171 is not warranted by the facts of this case. Whether the checkpoint — for the purposes of searches made prior to August 17, 1987, the date of the Jackson opinion — was a functional equivalent of the border under prior Fifth Circuit precedent, this Court finds that there was probable cause for the border patrol agent to conduct a search of the vehicle.

In the case before us, there were sufficient facts to warrant a border patrol agent to believe that the search would uncover evidence of a crime. The automobile exception to the warrant requirement of the fourth amendment applies when a moving vehicle is stopped and when there is probable cause to believe that a vehicle contains contraband. *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

On March 6, 1987, prior to the stop of the Defendants' car, Hudspeth County Deputy Sheriff Lewis alerted the Border Patrol Agents at Checkpoint Number 1171 to lookout for, and to stop a vehicle of an identity and description substantially identical to the car driven by the Defendants. Deputy Sheriff Lewis indicated that a driver of a pickup truck could be associated with the occupants of the suspect vehicle. Under the circumstances related by the testimony of the Border Patrol Agents who made the stop, this court is of the opinion that there was probable cause for the agents to believe that contraband would be found. The agents suspected a diversion was intended when a pickup truck bearing Kansas license plates, the same state of registration as the description of the Defendants' vehicle, drove up to the checkpoint and reported several aliens five miles back along the road. Some thirty minutes later when a vehicle matching the

description supplied by the County law officer drove to the checkpoint, there existed sufficient grounds to raise probable cause for the Border Patrol Agent to believe that contraband would be found.

Accordingly,

IT IS ORDERED that the Motion to Check the Validity of Functional Equivalent Status of Checkpoint Number 1171 is DENIED.

ENTERED, this, the 10th day of September, 1987.

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Lucius D. Bunton
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR WESTERN DISTRCT OF TEXAS
PECOS DIVISION

P-87-CR-18 (02)

Unites States of America
vs.
BILLY JOE HILL

JUDGMENT AND
PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this the 9th day of November 1987, with Counsel William A. Bratton with the plea of Not Guilty.

There being a finding of Guilty to the Indictment by Court Trial on October 6, 1987, Defendant has been convicted as charged of the offense(s) of commencing on or about March 6, 1987 in the Western District of Texas, defendants wilfully, knowingly and unlawfully conspired, combined, confederated and agreed together and with each other and with others to the grand jury unknown to commit offenses against the United States, in violation of Title 21 United States Code, section 846, that is to say, they conspired to possess and did possess a quantity of cocaine, a Schedule II Controlled Substance with intent to distribute same contrary to Title 21 United States Code, section 841(a)(1).

The court asked whether defendant had anything to

say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: Count 1: Five (5) years under the provisions of 18 U.S.C., § 4205(b)(2); Count 2: Five (5) years under the provisions of 18 U.S.C., § 4205(b)(2) plus a two (2) year term of special parole. The sentence imposed in Count Two is to run concurrently with the sentence imposed in Count One.

It is further ordered that defendant immediately pay to the Attorney General a penalty assessment of $100.00 for the purpose of funding the "Victims of Crime Act of 1984" pursuant to 18 USC, § 3013.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ Lucius D. Bunton

LUCIUS D. BUNTON
United States District Judge